Chinese Antimonopoly Law related Intellectual Property

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Structure of the Presentation

• Intellectual property protection in China
• Chinese Antimonopoly Law related intellectual property rights
• The prospect to improve the antimonopoly law related intellectual property rights
• Conclusions
The Protection of IPR in China

- IP rights are those rights which may be asserted in respect of the product of the human intellect.
- As an incentive to innovation, IP should be protected by law.
- Like other countries, IPR is recognized and protected in many ways in China.
Protection of IPR under Chinese Law

• Along with its progress in reform and opening up, China has formulated and fine-tuned various laws and regulations on intellectual property protection.

• The Outline of National Intellectual Property Strategy issued in 2008 announces that China will be constructed into a country with comparatively higher level of IPR creation, utilization, protection and administration by 2020.
Protection of IPR under Chinese Law

• China is determined to fully protect IPR. “If future generations don't know how to protect IP, we will miss out on dynamism in terms of innovative activity.“ (Chen)

• Nonetheless, because Chinese IP system was established only a short time ago, and as a result, awareness of IPR remains underdeveloped in society at large, and there is still insufficient appreciation of the importance of IPR protection.

• Anyway, “The competition around the world is the competition of IP, we will initiate more administrative and legal measures to protect IP and broaden education in society on the need to protect IP.” (When)
Antimonopoly Provisions related IPR

• The promulgation of Anti-Monopoly Law is a major event both in Chinese legal construction, and in Chinese economic construction. It has been deemed as milestone in the process of Chinese economic reform.

• Article 55 of the Law: Undertakings exercise intellectual property rights according to laws, administrative regulations related intellectual property rights, shall not be applied to this law; However, undertakings abuse the intellectual property rights to eliminate or restrict competition, shall be applied to this law.

• This provision means precisely that intellectual property right doesn’t enjoy exemption from AML.
Antimonopoly provisions related IPR

- Article 55 lays out the fundamental principle of the enforcement of antitrust law in the field of IPR.
- But there is great challenge in enforcing article 55: What acts are abuses of intellectual property rights to eliminate and restrict competition? Legal interpretations are required.
- Many concerns, in particular from abroad expressed.
- There is no case involved article 55 as of today.
IP-related Provisions in Contract Law

- Article 329: A technology contract which illegally monopolize technology and impede technological advancement or infringes on the technology of a third person is invalid.
Judicial Interpretation of the Article 329

• Restrict to carry out new R&D on the basis of the subject technology of the contract, or restrict the use of improved technology, or reciprocal conditions exchanging the improved technology are unequal;
• Restrict to obtain similar or competitive technology from other sources;
• Restrict to fully exploit the subject technology of the contract in accordance with an reasonable method based on market demand;
• Require the recipient to accept conditions which are not indispensable for the implementation of technology;
• Unreasonably restrict the sources that the recipient purchases raw materials, components, products or equipment;
• Prohibits to challenge the validity of IPR, or impose conditions on the challenge.
Antimonopoly -related Provisions in Patent Law

• Article 48: In the case of any of the following circumstances, the patent administrative department under the State Council may grant a compulsory license to exploit the patent for invention or utility model in accordance with the request of the entity or individual person who has the implementing conditions:
  – (A)…
  – (B) the patentee’s implementation of patent was identified as a monopoly by law, to eliminate or reduce the adverse effects made by such behavior.
Antimonopoly-related Provisions in Foreign Trade Law

• Article 30:

Where intellectual property rights holders prevent licensees from seeking clarification on validity of the intellectual property rights in the licensing contracts, or mandatory package licensing, or include terms of exclusive grant back rights in the licensing contracts, and jeopardize the fair competition order of foreign trade, the department responsible for foreign trade under the State Council may adopt necessary measures to eliminate harm.
Comments on Current Laws and Regulations

• The fact that Chinese lawmaker imposed various control on restraints of competition in the field of IP shows that China takes this issue seriously.

• However, the following inadequacies make it difficult for current IP–related antimonopoly provisions to deal with abuse of IP:
  – Lack of basic concepts such as relevant market and dominance;
  – Lack of comprehensive assessment of IP restraints on competition;
  – Lack of comprehensive consideration from perspective of two sides of licensing contracts;
  – Lack of comprehensive description of IP restraints on competition.
First Antimonopoly Case involved IP

- In 2004, Dexian claimed Sony utilized intelligent recognition techniques in its digital cameras and camcorders, ensuring only Sony batteries be used in these devices.

- Dexian claimed also that Sony held a dominant position in Chinese market for digital cameras and camcorders, and Sony intended to exclude competitors from supplying batteries for Sony’s cameras and camcorders, and this bundling should be deemed as unlawful.

- The Court accepted the case according to Art. 2 AUCL: "An operator shall, in transactions in the market, follow the principle of voluntariness, equality, fairness, honesty and credibility, and observe generally recognized business ethics”, even though the case was in essence an anti-monopoly dispute.

- 2007 the Court issued a decision in favor of Sony.
The Prospect for Improvement of China‘s IP-related AML

• Chinese scholar suggested the lawmaker that China should learn the experiences from the US, EU and Japan, and lay down specific provisions concerning restraints of competition in IP licensing, in order to provide enforcement agencies with guidelines, ensure legal stability and allow the parties to predict the legal consequences of their acts.

• SAIC is currently working on draft guidelines which will shed light on how Article 55 of the AML will be enforced. This draft is not publicly available.
Draft of the Guidelines for IP-related Antimonopoly Enforcement

Table of the contents:
1. General principles
2. Principles for IP-related antimonopoly enforcement and analysis standards
3. Monopoly agreement involved IP
4. Abusive behavior involved IP
5. Undertaking Concentration involved IP
6. Special kinds of behavior involved IP;
7. Supplementary provisions
Draft of the Guidelines for IP-related Antimonopoly Enforcement

• Compared with the IP Guidelines of other regimes, this draft discusses not only the licensing agreements, but also the IP-involved M&A and abusive behavior, in particular the rejection of licensing.

• The draft obviously accepts experiences from developed regimes, for example the safe harbor for horizontal and vertical licensing agreements.

• Problems of the draft, and there is no timetable for publication.
Conclusions

• On the whole, IPR protection and the enforcement of AML in China are essentially consistent, because they complement each other for the same purpose.
• However, because IPR protection is more out of the consideration of the economic value of IPR, and the AML is to protect competition, there must be conflict between them, and the exercises of IPR is possible to violate AML.
• As developing country, China must pay attention to the abuse of IPR, in addition to the protection of IPR.
• How to perceive the “abuse of IPR to eliminate or restrict competition” prescribed in Article 55 of the AML is an important and controversial question.
• I believe Chinese antimonopoly enforcer deals with the IP cases very carefully, and this kind of cases will not be so many as some people are concerned about.
Thank you very much for your attention!

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